LING BOON HUAT v. DING TOH BIEW

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: A-02(NCVC)(A)-312-03-2023]
22 MARCH 2024

Abstract – *A consent order operates as a contract. Parties are bound by the terms of the consent order and there is no rule that permits or allows one party to seek to imply a term into a consent order merely because it is a consent order. Thus, a consent order stands on the same footing as a contract that has been agreed upon by parties in the usual way. Hence, a party that seeks to rely on an implied term, bears the same burden, which must of necessity be onerous, to demonstrate that the requisite legal criteria has been met before a term is to be implied. A term would only be implied if it satisfies the test of business necessity and if the party seeking to rely on it could satisfy the court that without such a term 'the contract would lack commercial or practical coherence'.*

CIVIL PROCEDURE: *Judgments and orders – Consent order – Sale/transfer of property – Implied term – Whether there was implied term that property would be re-valued to reflect current market value – Whether plaintiff could seek re-valuation of property to cater for delay in implementation of consent order – Whether such term would change financial paradigm of consent order – Whether there was legal basis for terms to be implied – Whether there was abuse of court process*

The appellant ('defendant') was the tenant of a shophouse ('property') whilst the respondent ('plaintiff') was the landlord. The plaintiff commenced an action against the defendant in the Sessions Court ('Sessions Court suit') for breach of a tenancy agreement entered into between the defendant and the plaintiff ('tenancy agreement'). The Sessions Court suit was allowed. The defendant appealed to the High Court against the Sessions Court judgment. Subsequently, after negotiations, a consent order dated 23 March 2015 was entered into between the parties ('2015 consent order') on the following terms, *inter alia;* (i) the property was to be sold to the defendant with the purchase price to be assessed by a court appointed licensed valuer; and (ii) the defendant was to pay the plaintiff a sum of RM40,500 and rent of RM1,500 per month calculated from 1 May 2006 until full settlement thereof. Pursuant to the 2015 consent order, Messrs Jordan Lee & Jaafar Sdn Bhd ('Messrs JLJ') was appointed to prepare a valuation report of the property. The report prepared by Messrs JLJ ('2015 report') valued the property at RM600,000. Notwithstanding the preparation of the 2015 report, the defendant did not comply with the terms of the 2015 consent order. The plaintiff therefore commenced execution proceedings against the defendant in

A respect of the 2015 consent order. The defendant once again attempted to enter into negotiations with the plaintiff. Thus, mediation proceedings were commenced between the parties, which gave rise to another consent order ('2017 consent order'), and the terms were, *inter alia,* (i) parties were to enter a sale and purchase agreement ('SPA') in respect of the property; and (ii) the B judgment sum pursuant to the 2015 consent order shall be paid by the defendant to the plaintiff in nine instalments within nine months from the date of signing the SPA. However, the defendant once again failed to comply with the 2017 consent order. The plaintiff contended that the 2015 consent order and the 2017 consent order constituted valid and binding agreements C between the defendant and the plaintiff. In this regard, the plaintiff alleged that the defendant had breached the express terms of the agreements between the parties per the 2015 consent order and 2017 consent order. According to the plaintiff, since the SPA in respect of the property was not entered into, executed and/or perfected within the time period as stipulated in the 2017 consent order, the purchase price of the property ought to be re-valued as at D the time period when the SPA was actually entered into, executed and/or perfected; and the costs/fees of engaging a valuer to prepare a re-valuation was to be borne by the party in breach ('implied term'). The plaintiff submitted that the implied term was necessary because the market value of the property valued in the 2015 report was defined in the same report as the E estimated value of the property on the date of valuation. There were other litigation issues that arose between the plaintiff's family and the defendant's family over the years which led to a conditional stay order whereby, *inter alia*, the plaintiff and his siblings were ordered to, on a joint and several basis, pay a sum of RM2,500,000 to the defendant and his father ('Condition 1'). F An agreement and/or arrangement was reached by the parties in respect of the terms of, *inter alia*, condition 1 of the conditional stay order where they were varied to the following extent, that the sum of RM2,500,000 under condition 1 be set off against the set-off sum. The plaintiff then approached several law firms to conduct a fresh valuation of the property for the purpose G of transferring the property to the defendant pursuant to condition 1. The originating summons ('OS') was therefore commenced to specifically enforce the implied term, for a re-valuation of the property to be carried out for the purpose of the transfer of the property. In this regard, the plaintiff also sought an order that a new valuer firm be appointed to prepare a re-valuation of the property. The High Court Judge ('HCJ') agreed with the plaintiff and ordered H a fresh valuation to be undertaken. Hence, this appeal.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

I **(1)** A consent order operates as a contract. Parties are bound by the terms of the consent order and there is no rule that permits or allows one party to seek to imply a term into a consent order merely because it is a consent order. Thus, a consent order stands on the same footing as a contract that was agreed upon by parties in the usual way. The difference

is that a consent order is underpinned by the command of the court. Hence, a party which seeks to rely on an implied term, bears the same burden, which must of necessity be onerous, to demonstrate that the requisite legal criteria has been met before a term is to be implied. (paras 28 & 29)

(2) There was a term in the 2017 consent order that if the defendant failed to comply with the consent order, then the plaintiff was free to commence execution proceedings against the defendant. There was no express term in the consent order that allowed for any sort of price adjustment whatsoever to cater for any delay or dilatoriness on the defendant's part and consequently for the plaintiff to seek a re-valuation of the subject property to cater for any delay in the implementation of the consent order and any price appreciation. The HCJ had plainly misdirected himself in implying a term based on 'efficacy' such that the plaintiff became entitled to insist on a re-valuation and extract further sums from the defendant as part of the purchase consideration. (paras 31 & 33)

(3) If the plaintiff intended to reserve for himself the right to a revision of the purchase consideration per the 2017 consent order, whether due to passage of time, or due to any dilatory conduct of the defendant *etc*, then it was open to the plaintiff to have inserted a term to that effect. It was obvious that such a term was one that would change the whole financial paradigm of the consent order. This court did not see how the plaintiff could just seek to imply a term in this fashion. There was also no declaration sought in the OS for a term to be implied. The OS sought an order for a fresh valuation as if there was already a term allowing the plaintiff to seek a revised valuation. A term would only be implied if it satisfies the test of business necessity and if the party seeking to rely on it could satisfy the court that without such a term 'the contract would lack commercial or practical coherence.' (paras 34-36)

(4) The HCJ conflated the principles pertaining to the court's power to amend/vary a court order with the power of the court to imply a term into a contract or consent order. The HCJ seemed to say on the one hand that the plaintiff was not seeking to vary the consent order and yet, on the other hand, went on to say that the court had the power to amend or vary a consent order in certain situations. Clearly, the plaintiff had utilised the OS as a convenient substitute for execution proceedings and *via* the implied terms, gave the plaintiff the right to enhance the purchase consideration through a re-valuation of the property. Ultimately, what had happened here was effectively a 'fundamental re-writing' of the terms of the contract as evidenced by the 2017 consent order. This was quite clearly an afterthought and abuse of process on the part of the plaintiff. There was absolutely no legal basis for terms to be implied in the manner as sought by the prayers in the OS. Appellate intervention was thus warranted. (paras 38 & 39)

A **Case(s) referred to:**

Ali v. Petroleum Company of Trinidad And Tobago (Trinidad And Tobago) [2017] UKPC 2 ***(refd)***

Marks And Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

B *Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC* ***(refd)***

For the appellant - Hong Chong Hang & Koay Jing Qian; M/s Hong Chew King & Co
For the respondent - Saw Wei Siang; M/s Nethi & Saw

[Editor's note: Appeal from High Court, Ipoh; Originating Summons No: AA-24NCVC-
C *349-08-2022 (overruled).]*

Reported by Suhainah Wahiduddin

JUDGMENT

D **S Nantha Balan JCA:**

Introduction

[1] This is an appeal by Ling Boon Huat (defendant in the High Court). The respondent in the appeal is Ding Toh Biew (plaintiff in the High Court).
E For convenience, we shall refer to the appellant and respondent as "defendant" and "plaintiff". The defendant's appeal is directed at the decision of the learned judge of the High Court at Ipoh dated 24 February 2023 in allowing the reliefs sought by the plaintiff per the originating summons dated 18 August 2022 ("the OS"). The prayers in the OS read as follows:

F

(i) that either one of the following firms below be appointed to prepare a valuation report to ascertain the market value of the land held under Pajakan Negeri 104836, Lot 34919, Mukim Sitiawan, District Manjung Perak with a postal address at No. 31, Taman Ilmu, Sitiawan ("property") as of the date of this order;

G

(a) Messrs Muthu and Lee;

(b) Messrs Rahim & Co International Sdn Bhd; and

(c) Messrs JB Jurunilai Bersekutu Sdn Bhd.

H (ii) that the costs/fees of engagement of the court-appointed valuer to prepare a new valuation report be borne by the defendant;

(iii) an order that if the property is valued at a sum higher than RM600,000, the differential sum between the sum so valued and the sum of RM600,000 be forthwith repaid by the defendant to the plaintiff;

I

(iv) costs; and

(v) further and/or other reliefs that this Honourable Court deems fit.

The Issue

[2] The issue that arises for consideration in this appeal is whether, *vis-a-vis* the consent order which was recorded between the plaintiff and defendant in Ipoh Sessions Court Application for Execution No. AA-56-WS-30-12/2015 on 6 February 2017 by which the property was to be sold/transferred by the plaintiff to the defendant, based on the purchase consideration of RM600,000, a term should be implied that the property should be re-valued to reflect the current market value and that the defendant is to pay the difference, in the event the valuation is higher than RM600,000.

Background Facts

[3] The property is a shophouse. The defendant was the tenant of the property whilst the plaintiff was the landlord. In 2006, the plaintiff commenced an action against the defendant, in Ipoh Sessions Court, Suit No: 52-1571-2006 ("Sessions Court Suit") for breach of a tenancy agreement dated 5 November 2003 entered into between the defendant and the plaintiff ("tenancy agreement"). Under the tenancy agreement, the defendant had agreed to rent the property at a monthly rent of RM1,500 for three years.

[4] The Sessions Court Suit was allowed. The defendant appealed to the High Court against the Sessions Court judgment, *via* Ipoh High Court, Civil Appeal No: 12BNCVC-132-10/2011. Subsequently, after negotiations between parties, a consent order dated 23 March 2015 was entered into between parties on the following terms ("2015 consent order"):

(i) the property was to be sold to the defendant, with the purchase price to be assessed by a court-appointed licensed valuer;

(ii) the defendant was to pay the plaintiff a sum of RM40,500 and rent of RM1,500 per month calculated from 1 May 2006 until full settlement thereof;

(iii) the defendant to pay interest of 8% per annum from 27 June 2006 until the full settlement of the total judgment sum; and

(iv) parties to bear their respective costs of the appeal.

[5] Pursuant to the 2015 consent order, Messrs Jordan Lee & Jaafar Sdn Bhd ("Messrs JLJ") was appointed to prepare a valuation report of the property in 2015. The report prepared by Messrs JLJ on 8 September 2015 ("2015 report") valued the property at RM600,000 as at September 2015.

[6] Notwithstanding the preparation of the 2015 report, the defendant did not comply with the terms of the 2015 consent order. He failed to pay any part of the judgment sum and the interest. The plaintiff therefore commenced execution proceedings against the defendant in respect of the 2015 consent order, in Ipoh Sessions Court, Execution Application: AA-56-WS-30-12/2015.

[7] The defendant once again attempted to enter into negotiations with the plaintiff. Thus, mediation proceedings were commenced between parties. This gave rise to another consent order dated 6 February 2017 ("the 2017 consent judgment"). The terms of the 2017 consent order were as follows:

(i) parties are to enter into a sale and purchase agreement ("SPA") in respect of the property within six weeks of the date of the 2017 consent order;

(ii) the SPA is to be perfected within nine months of its execution by parties;

(iii) the judgment sum pursuant to the 2015 consent order shall be paid by the defendant to the plaintiff in nine instalments within nine months from the date of signing the SPA;

(iv) the perfection of the SPA and settlement of the judgment sum shall be done simultaneously; and

(v) if the defendant fails to comply with/ breaches the terms of the 2017 consent order, **the plaintiff is at liberty to commence execution proceedings against the defendant**.

(emphasis added)

[8] Pursuant thereto, a draft SPA was circulated among parties, in accordance with the terms of the 2017 consent order. However, despite the express terms of the 2017 consent order, the defendant once again failed to comply with the 2017 consent order. In particular, the defendant failed to:

(i) execute the SPA within the stipulated time period of six weeks from the date of the 2017 consent order; and

(ii) pay the total judgment sum pursuant to the 2015 consent order in nine instalments within nine months from the date of signing the SPA.

[9] The plaintiff contends that 2015 consent order and 2017 consent order constituted valid and binding agreements between the defendant and the plaintiff.

[10] In this regard, it is alleged that by failing to execute the SPA and pay the judgment sum pursuant to the 2015 consent order within the stipulated time period, the defendant had breached the express terms of the agreements between parties per the 2015 consent order and 2017 consent order. As such, the plaintiff contended that, it is obvious and necessary that the following term be implied into the 2015 consent order and 2017 consent order to give efficacy to the agreement between parties, namely, "the purchase price of the property ought to be contemporaneously valued as at the time period the SPA is to be entered into, executed and/or perfected between parties".

[11] According to the plaintiff, since the SPA in respect of the property was not entered into, executed and/or perfected within the time period as stipulated in the 2017 consent order, the purchase price of the property ought

to be re-valued as at the time period when the SPA is actually entered into, executed and/or perfected; and the costs/fees of engaging a valuer to prepare a re-valuation is to be borne by the party in breach (collectively, "the implied term"). According to the plaintiff, the implied term is necessary because the market value of the property as valued in the 2015 report is defined in the same report as the estimated value of the property on the date of valuation.

[12] Hence, (according to the plaintiff), such a value should be reviewed on a regular basis by taking into consideration property market conditions and other factors over a period of time. The plaintiff also contends that it could not have been the intention of the parties that the value of the property as assessed in 2015 can nevertheless be relied upon for a sale and purchase transaction many years down the road. This is especially so when the delay is caused by the breach of the defendant, who is a party to the 2015 consent order and the 2017 consent order.

Other Litigation

[13] In or around 2006, disputes arose between the defendant and his father, Mr Ling Peek Hoe ("the Lings") and the plaintiff and his siblings ("the Dings"). This led to the filing of two suits *ie*, Ipoh High Court Writ No. (M1)22-203-2006 ("Suit 203") and Ipoh High Court Writ No. (M3)22-45-2008 ("Suit 45") by the Lings against the Dings. Both Suit 203 and Suit 45 were consolidated and tried together. The Lings eventually succeeded at obtaining judgment against the Dings. The assessment of damages took place and on or about 10 January 2022, the High Court ordered a substantial amount of damages to be paid by the Dings to the Lings ("damages award"). The Dings lodged two appeals against the damages award. They are Appeal No. A-02(W)-236-02/2022 ("Appeal 236") and Appeal No. A-02(W)-23702/2022 ("Appeal 237"). Both Appeal 236 and Appeal 237 ("Merits Appeals") were consolidated to be heard together by an order dated 5 April 2022. They were scheduled to be heard before the Court of Appeal on 15 November 2022. Pending the disposal of the appeals, the Lings took steps to execute the damages award.

[14] Hence, the Dings applied to the High Court for a stay of the damages award on or about 21 February 2022 and 18 March 2022, respectively ("stay applications"). On 13 April 2022, the High Court heard the stay applications and granted a stay of the damages award subject to the following conditions ("conditional stay order"):

(i) that the Dings, on a joint and several basis, are to pay a sum of RM2,500,000 to the Lings through the Lings' solicitors, by 12pm on 20 April 2022 ("condition 1"); and

(ii) that the balance judgment sums pursuant to the judgment dated 10 January 2022 accruing as at 13 April 2022, is to be deposited by the Dings, into an interest-bearing account operated jointly by the solicitors for the Lings and the solicitors for Ding Siew Ching, by 12pm on 4 May

A 2022, upon the respective solicitors' undertaking to release the deposited sum to the successful parties in Appeal 236 and Appeal 237 ("condition 2").

[15] Subsequently, the Dings lodged two appeals against the conditional stay order, *ie*, Appeal No. A-02(W)-733-04/2022 ("Appeal 733") and
B Appeal No. A-02(W)-736-04/2022 ("Appeal 736"). The Lings had also lodged an appeal against the conditional stay order in Appeal No. A-02(W)-735-04/2022 ("Appeal 735"). All three appeals ("stay appeals") were consolidated to be heard together on 22 August 2022.

C **[16]** Pending the disposal of the stay appeals, the Dings filed two motions to the Court of Appeal for an interim stay of the conditional stay order and the damages award, on 26 April 2022 and 6 May 2022 respectively ("interim stay motions").

[17] An agreement and/or arrangement was reached by parties in respect
D of the terms of Conditions 1 and 2 of the conditional stay order where they were varied to the following extent:

(i) that the sum of RM2,500,000 under condition 1 be set-off against the set-off sum;

E (ii) that the balance sum of RM1,383,820 be paid to the Lings' solicitors in the following manner:

(iii) a sum of RM1,000,000 be paid by 20 April 2022; and

(iv) a sum of RM383,820 be paid by 29 April 2022.

F **[18]** That the Dings are given until 26 May 2022 to comply with Condition 2.

[19] On 20 May 2022, the Court of Appeal heard the Dings' interim stay motions and the Lings' striking out motions and granted an interim stay of the conditional stay order and the damages award, pending the disposal of
G the stay appeals. The striking out motions were dismissed with costs. The stay appeals were then scheduled to be heard on 22 August 2022.

[20] On or about 20 April 2022, the plaintiff approached Messrs JLJ to conduct a fresh valuation of the property for the purpose of transferring the property to the defendant pursuant to Condition 1.

H **[21]** However, on 13 July 2022, Messrs JLJ declined to consent to an appointment by the court to conduct a new valuation of the property.

[22] In view of Messrs JLJ's rejection, the plaintiff approached several other valuer firms in Ipoh to consent to an appointment by the court to
I prepare a new valuation report in respect of the property. The OS was therefore commenced to specifically enforce the implied term, for a re-valuation of the property to be carried out for the purpose of the transfer

of the property. In this regard, in view of Messrs JLJ's rejection to be appointed, the plaintiff also sought for an order that a new valuer firm from the list stated in the OS be appointed to prepare a re-valuation of the property.

[23] The plaintiff (rather curiously) asserts in the OS that "no prejudice will be caused to the defendant if the OS is allowed". As far as the defendant was concerned, they opposed the OS by contending that "there was no necessity to appoint another valuer to prepare a re-valuation of the property and that it was sufficient to rely on the valuation report prepared in 2015 to determine the value of the property."

High Court – Findings And Conclusions

[24] The learned judge agreed with the plaintiff and ordered a fresh valuation to be undertaken. In the grounds of judgment, the High Court referred to the 2017 consent order as "second consent order". The High Court's findings (*in verbatim*) are as follows:

> [10] Pursuant to the 2nd consent judgment, the defendant had signed a Sale and Purchase Agreement and made a deposit payment of RM60,000 on 20.3.2017 ("**the SPA**"). The plaintiff had however requested for further amendment of the SPA. The defendant had instructed his solicitors to ignore the plaintiff's request to further amend the SPA.
>
> [11] The plaintiff had, through his solicitor, proceeded to send a copy of the SPA to the defendant's solicitor for the defendant's perusal and comments. The defendant had however failed, refused and/or neglected to provide any response in respect of the SPA.
>
> [12] As a result of the defendant's failure, refusal and/or neglect to return the amended SPA to the plaintiff for his execution, the deposit payment of RM60,000 had been utilised by the plaintiff towards the part payment of the judgment debt.
>
> [13] Based on the factual matrix of the case, it is in my considered view that the defendant had acted in contrary to the 1st and 2nd consent judgment in failing to execute the SPA.
>
> [14] It is my observation that although the defendant did not seek for the consent judgment to be set aside, since the 1st consent judgment was recorded in 2015, the defendant did not cooperate, did not comply and did not give effect to the terms of the consent judgment making the consent judgment unworkable.
>
> [15] It was heavily contended by the defendant that since Messrs Jordan Lee & Jaafar had been appointed on 8.9.2015 and had valued the property at RM600,000, there was thus no necessity to appoint another valuer to prepare a re-valuation of the property in respect of the SPA prepared in 2017.

A [16] It was, however, expressly stated in the said Valuer Report prepared by Messrs Jordan Lee & Jaafar that the market value as assessed was not permanent in nature and shall be reviewed on a regular basis in view of the changes in property market and conditions and other factors over a period of time.

B [17] The defendant had merely contended that there was no necessity to appoint another valuer to prepare a re-valuation of the property and that it was sufficient to rely on the Valuation Report prepared in 2015 to determine the value of the property.

C [18] Under established principles of the law, that an order by consent is evidence of the contract between parties which therefore remains valid, binding and enforceable (see *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 MLRA 525; [1981] 2 MLJ 145). There is no Court order staying the execution of the consent judgment. As such, the consent judgment entered by the parties remains absolutely intact and binding on the parties.

D [19] It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see *Bandar Baru Villa Sdn Bhd v. Malaysia Building Society Berhad* [2017] 1 MLRH 1).

E [20] As parties are duty bound to obey an order of the court such as the consent judgment until and unless it is varied or set aside, and disobedience may subject the defaulting party to committal proceedings (see the Supreme Court's decision in *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 1 MLRA 260; [1993] 2 MLJ 217).

F [21] In the circumstances, *in order to give efficacy to the 1st and 2nd consent judgment, it is necessary that a valuer be appointed to prepare a re-valuation of the property as at the time period of the SPA is to be entered into, executed and/or perfected between parties*.

G [22] In the absence of any legally recognised basis to impugn the continued validity of the consent judgment which remains resolutely unchallenged and unimpaired, its terms must continue to be binding on the parties. Any attempt by the defendant to depart or move away from strictly adhering to the same would thus tantamount to a form of non-compliance, if not an outright transgression. As it transpired, the defendant had indeed failed to abide by the terms of the 1st and 2nd consent judgment.

H

[23] I have kept an open mind in considering the above case and having read in details, it is in my considered view that the plaintiff is seeking to give effect to the 1st and 2nd consent judgment. *The plaintiff is not seeking to vary, set aside or even alter the 1st and 2nd consent judgment. The sanctity of the 1st and 2nd consent judgment will remain untouched and there is no attempt whatsoever to revive the previous proceedings before the Court which resulted in parties entering into the 1st and 2nd consent judgment*.

I

[24] Whether the Court has the discretion to amend any Orders at any time to reflect what had been Ordered in fact was explained in *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417, where Peh Swee Chin J had held that before an Order has been perfected the Court has inherent jurisdiction to review the matter. However, when an Order had been extracted and perfected, the Court can still review the same but only with the consent of both parties, or as expressly provided under the Rules of Court. However with respect to this power to review the Order, the Court said this:

> ... the nature of this power is not a blanket one; it is subject to a restriction which is, to correct an error in the Order itself where the Order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different Order. The power is exercised concurrently with the express power to correct any clerical error, or error arising from accidental slip or omissions as expressly conferred by O. 20 r. 11 of the Rules of the High Court 1980.

[25] It is also established principle that the court has inherent power to vary its own Orders so as to carry out its own meaning and to make its meaning plain see *Thynne v. Tynne* [1955] P272 CA; *Pearlman (Veneers) S.A. (Pty) v. Bernhard Bartels* [1954] 1 WLR 1457 and other cases cited in the Supreme Court Practice 1993 Vol 1 Part 1 London Sweet & Maxwell.

[26] In *Hatten v. Harris* [1892] AC 560 Lord Watson said:

> Where an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in Order to bring in harmony with the Order which the judge obviously meant to pronounce.

[27] On the strength of the above authorities, it is therefore in my considered view that the consent judgment entered by the parties remains absolutely intact and binding on the parties, *the plaintiffs in the present case are not seeking to vary or set aside the consent judgment but merely seeking further directions from this Honourable Court to enforce the said consent judgment. This court had full inherent jurisdiction and powers to compel the performance in obligation and terms by the parties to the consent judgment*.

Conclusion

[28] In the light of the foregoing and in the upshot, after hearing the submission by both parties, it is this Court's decision that the plaintiff has successfully proven his case.

[29] *In order to give efficacy to the execution of the consent judgment*, this Court hereby ordered as follows:

(i) That either one of the following firms below be appointed to prepare a valuation report to ascertain the market value of the land held under Pajakan Negeri 104836, Lot 34919, Mukim Sitiawan, District

A Manjung Perak with a postal address at No. 31, Taman Ilmu, Sitiawan ("the property") as of the date of this order:

(a) Messrs Muthu and Lee,

(b) Messrs Rahim & Co International Sdn Bhd; and

B (c) Messrs JB Jurunilai Bersekutu Sdn Bhd.

(ii) That the costs/fee of engagement of the court-appointed valuer to prepare a new valuation report be borne by the plaintiff and the defendant equally;

(iii) An order that if the property is valued at a sum higher than
C RM600,000, the differential sum between the sum so valued and the sum of RM600,000 be forthwith repaid by the defendant to the plaintiff, and

(iv) No order as to costs.

(emphasis added)

D **Our Decision**

Implied Term – The Law

[25] In view of the approach taken by the learned judge in the instant case, we think that it is not just useful, but, in our view, timely, necessary and
E imperative to allude to the established local jurisprudence and the more recent judicial statements on implied terms which have emanated from the Privy Council and the Supreme Court of the United Kingdom. The starting point is the Federal Court's decision in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151, where Peh Swee Chin
F FCJ lucidly stated the law in the following words (pp. 531 to 532 (CLJ); pp. 169 to 170 (MLJ):

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has
G not been expressly set out in the contact. The implied term contended for in this appeal belongs to this type and much more about this later.
>
> The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such ratio decidendi in respect of
H such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the
I employer's interest, and again there is another implied term that the employer will provide a safe system of work.

Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasize that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.

The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '... it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as of course, so and so will happen, we did not trouble to say that, it is too clear'.

A Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p. 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which
B the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander,
C would have been a testy answer of 'Oh, don't talk rubbish'.

[26] More recently in *Ali v. Petroleum Company of Trinidad and Tobago (Trinidad and Tobago)* [2017] UKPC 2; [2017] WLR(D) 110, [2017] IRLR 432, [2017] Bus LR 784, [2017] ICR 531 (PC), Lord Hughes, speaking for the (majority) in the Privy Council, referred to Lord Neuberger's seminal
D judgment in *Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742; [2016] 4 All ER 441; [2016] AC 742, [2015] WLR(D) 501; [2016] CILL 3779, [2015] UKSC 72; [2015] 3 (UKSC) ("*Marks and Spencer*") and summarised the legal position by stating at [7];

E [7] It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been re-stated by the Supreme Court in *Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way
F which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, *ex hypothesi*, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice,
G "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy.

Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The
H fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.

I **[27]** For completeness, we have also reproduced the relevant passages from Lord Neuberger's comprehensive and erudite discussion/decision on implied terms in *Marks and Spencer*;

15. As Lady Hale pointed out in *Geys v. Societe Generate* [2013] 1 AC 523, para 55, there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.

16. There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in *Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206, 227, MacKinnon LJ observed that, "*[p]rima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

17. Support for the notion that a **term will only be implied if it satisfies the test of business necessity** is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in *Liverpool City Council v. Irwin* [1977] AC 239, 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in issue was mentioned by Lady Hale in Geys at para 55 and by Lord Carnwath in *Arnold v. Britton* [2015] 2 WLR 1593, para 112.

18. In the Privy Council case of *BP Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [1977] UKPC 13, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

A

> *[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract*.

B

19. In *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with

C

confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain ... eventuality" and

D

"may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:

> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the

E

> performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.
>
> [He then quoted the observations of Scrutton LJ in *Reigate*, and continued] [I]t is not enough to show that had the parties foreseen

F

> the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...

G

20. Sir Thomas's approach in *Philips* was consistent with his reasoning, as Bingham LJ in the earlier case *The APJ Priti* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because

H

such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

21. In my judgment, *the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in*

I

BP Refinery as extended by Sir Thomas Bingham in Philips and exemplified in The APJ Priti. First, in *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that *the implication of a term was "not*

critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and *thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly*, as Lord Hoffmann I think suggested in *Attorney General of Belize v. Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, *I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care"*, to quote from Lewison, *The Interpretation of Contracts* 5th edn (2011), para 6.09. *Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence*.

22. Before leaving this issue of general principle, it is appropriate to refer a little further to Belize Telecom, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?". There are two points to be made about that observation.

23. First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference). The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in

Equitable Life Assurance Society v. Hyman [2002] 1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "[t]he legal test for the implication of ... a term is ... strict necessity", which he described as a "stringent test").

[24] It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that *Belize Telecom* has been interpreted by both academic lawyers and judges as having changed the law. Examples of academic articles include C Peters, *The Implication of Terms in Fact* [2009] CLJ 513, P Davies, *Recent Developments In The Law of Implied Terms* [2010] LMCLQ 140, J McCaughran *Implied Terms: The Journey of the Man on the Clapham Omnibus* [2011] CLJ 607, and JW Carter and *W Courtney, Belize Telecom: A Reply to Professor McLauchlan* [2015] LMCLQ 245). And in *Foo Jong Peng v. Phua Kiah Mai* [2012] 4 SLR 1267, paras 34-36, the Singapore Court of Appeal refused to follow the reasoning in *Belize* at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms" (reasoning which was followed in *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following *Belize Telecom*.

25. The second point to be made about what was said in *Belize Telecom* concerns the suggestion that the process of implying a term is part of the exercise of interpretation. Although some support may arguably be found for such a view in Trollope at p 609, the first clear expression of that view to which we were referred was in *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co Ltd* [1997] AC 191, 212, where Lord Hoffmann suggested that the issue of whether to imply a term into a contract was "one of construction of the agreement as a whole in its commercial setting". Lord Steyn quoted this passage with approval in *Equitable Life* at p 459, and, as just mentioned, Lord Hoffmann took this proposition further in *Belize Telecom*, paras 17-27. Thus, at para 18, he said that "the implication of the term is not an addition to the instrument. It only spells out what the instrument means"; and at para 23, he referred to "The danger ... in detaching the phrase 'necessary to give business efficacy' from the basic process of construction". Whether or not one agrees with that approach as a matter of principle must depend on what precisely one understands by the word "construction".

26. I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in *Belize Telecom* could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.

28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.

29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.

30. It is of some interest to see how implication was dealt with in the recent case in this court of *Aberdeen City Council v. Stewart Milne Group Ltd* 2012 SLT 205. At para 20, Lord Hope described the implication of a term into the contract in that case as "the product of the way I would interpret this contract". And at para 33, Lord Clarke said that the point at issue should be resolved "by holding that such a term should be implied rather than by a process of interpretation". He added that "[t]he result is of course the same".

> 31. It is true that *Belize Telecom* was a unanimous decision of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord Hoffmann's observations in *Belize Telecom*, paras 17-27 are open to more than one interpretation on the two points identified in paras 23-24 and 25-30 above, and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms.
>
> 32. Having made those general remarks about implied terms, I turn to consider the specific issue on this appeal, namely the claimant's contention that it is entitled to claim the apportioned sum from the defendants by virtue of an implied term to that effect in the Lease. I shall start by focussing on the terms of the Lease and the Deed, and then turn to the broader picture.

[28] We turn now to the case at hand. The starting point here is that a consent order operates as a contract. In *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465, 'a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order". It is important to emphasise that the parties are bound by the terms of the consent order and there is no rule that permits or allows one party to seek to imply a term into a consent order merely because it is a consent order.

[29] Thus, a consent order stands on the same footing as a contract that was agreed upon by parties in the usual way. The difference is that a consent order is underpinned by the command of the court. Hence, a party which seeks to rely on an implied term, bears the same burden, which must of necessity be onerous, to demonstrate that the requisite legal criteria has been met before a term is to be implied.

[30] In the present case, the entire basis upon which the plaintiff sought to rely on the implied terms may be gathered from paras. [13] and [14] of the plaintiff's affidavit affirmed on 18 August 2022, filed in support of the OS. The paragraphs read as follows:

> 13. In the circumstances, I am advised and believe that it is obvious and necessary that the following terms be implied into the 2015 Consent judgment and 2017 consent judgment to give efficacy to the agreement between parties:
>
> 13.1. The purchase price of the property ought to be contemporaneously valued as at the time period the SPA is to be entered into, executed and/or perfected between parties;

13.2. In the event the SPA in respect of the property was not entered into, executed and/or perfected within the time period stipulated in the 2017 consent judgment, the purchase price of the property therefore ought to be re-valued as at the time period the SPA is actually entered into, executed and/or perfected; and

13.3. The costs/fees of engaging a valuer to prepare a re-valuation to be bome by the party in breach. (collectively, the "Implied Terms")

14. This is because the market value of the property as valued in the 2015 Report is defined in the same report as the estimated value of the property on the date of valuation. Such a value should therefore be reviewed on a regular basis by taking into consideration property market and conditions and other factors over a period of time. It cannot be the intention of the parties that the value of the property as assessed in 2015 can nevertheless be relied upon for a sale and purchase transaction many years down the road. This is especially so when the delay is caused by the breach of a party to the 2015 consent judgment and the 2017 consent judgment.

[31] In the present case, it is pertinent to note that there was a term in the 2017 consent order that if the defendant failed to comply with the consent order, then the plaintiff is free to commence execution proceedings against the defendant. More importantly, there was no express term in the consent order that allowed for any sort of price adjustment whatsoever to cater for any delay or dilatoriness on the defendant's part and consequently for the plaintiff to seek a re-valuation of the subject property to cater for any delay in the implementation of the consent order and any price appreciation.

[32] It is material to note that the purchase price (RM600,000) was in fact paid on 20 May 2022, whereas the OS was filed on 18 August 2022. The monthly rental and interest were also paid. On 1 November 2022, the property was transferred to the defendant. Nevertheless, the plaintiff contends that a term should be implied to allow for a review of the valuation on terms as prayed for in the OS.

[33] Having regard to all the facts and circumstances and upon an application of the relevant legal principles, we take the view that the learned judge had plainly misdirected himself in implying a term based on "efficacy" such that the plaintiff became entitled to insist on a re-valuation and extract further sums from the defendant as part of the purchase consideration.

[34] In our view, if the plaintiff intended to reserve for himself the right to a revision of the purchase consideration per the 2017 consent order, whether due to passage of time, or due to any dilatory conduct of the defendant *etc*, then it was open to the plaintiff to have inserted a term to that effect. It is obvious that such a term is one that would change the whole financial paradigm of the consent order.

A **[35]** We do not see how the plaintiff can just seek to imply a term in this fashion. We also note that there is no declaration sought in the OS for a term to be implied. The OS seeks an order for a fresh valuation as if there is already a term allowing the plaintiff to seek a revised valuation.

B **[36]** It is significant that the learned judge did not consider the fact that there was a term in the 2017 consent order entitling the plaintiff to compel the defendant to perform their obligations under the consent order. It bears repeating that a term will only be implied if it satisfied the test of business necessity and if the party seeking to rely on it can satisfy the court that without such a term, "the contract would lack commercial or practical C coherence".

[37] Hence, at the risk of repetition it is necessary to mention that there is nothing in the 2017 consent order which provided for any "price adjustment" due to any delay or dilatoriness on the part of the defendant. What was provided for was a term which allowed the plaintiff to commence execution D against the defendant to ensure that there is compliance with the terms of the 2017 consent order. Of course, we know that matters became complicated or delicate because of the "other litigation" involving the Lings and the Dings. But that adds nothing to the discussion on the topic of implied terms.

E **[38]** From our reading of the grounds of judgment, it is clear that the learned judge conflated the principles pertaining to the court's power to amend/vary a court order with the power of the court to imply a term into a contract or consent order. The learned judge seemed to say on the one hand that the plaintiff was not seeking to vary the consent order (see paras. [23] and [27] of the grounds of judgment) and yet, on the other F hand, went on to say that the court had power to amend or vary a consent order in certain situations (see para. [25] of the grounds of judgment).

[39] Clearly, the plaintiff had utilised the OS as a convenient substitute for execution proceedings and *via* the implied terms, gave the plaintiff the right to an enhanced purchase consideration through a re-valuation of the G property. Ultimately, what has happened here is effectively a "fundamental re-writing" of the terms of the contract as evidenced by the 2017 consent order. This is quite clearly an afterthought and abuse of process on the part of the plaintiff. We are satisfied that there was absolutely no legal basis for terms to be implied in the manner as sought by the prayers in the OS. In our H view, the learned judge had erred in allowing the OS. As such, appellate intervention is warranted. The appeal is allowed and the High Court's order dated 24 February 2023 is set aside. We allow costs of RM10,000 to the defendant (appellant) subject to allocatur.

I